United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1235

IN THE

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

B
P/S

ABDON ACEVEDO, et al.

Appellants,

- v -

NASSAU COUNTY, et al.

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES,

TOWN OF HEMPSTEAD and TOWN BOARD
OF THE TOWN OF HEMPSTEAD

UNITED STATES COURT OF APPEALS
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PRELIMINARY STATEMENT

This is an appeal from the final judgment made and entered the 5th day of February, 1974, in the United States District Court, Eastern District of New York, by the Honorable Mark A. Costantino, United States District Judge, in favor of

the defendants and against the plaintiffs, dismissing plaintiff's cause with prejudice.

ARGUMENT

On this appeal, plaintiffs raise no issue referable to the Town of Hempstead or the Town Board of the Town of Hempstead (hereinafter Town).

Except for the issue applicable to the General Services Administration [Plaintiff's Brief - vi, 5], all others presented for review specifically are committed to "a reversal of plans for low-income family housing at Mitchel Field" or words of similar import.

This so-called reversal of plans is laid at the doorstep of the Town nowhere in the claim itself or in plaintiffs' Statement of the Case or in their Statement of Facts. It first appears in plaintiffs' Argument [Pl Br p. 39] and even then as though written into the lower court's decision, which it was not. It again appears at the top of page 42 of plaintiffs' brief as a "logical and legally mandated conclusion" based upon the lower court findings which neither mention the Town nor even remotely connect-up the Town.

The record is clear that there has never been a "reversal" of housing plans at Mitchel Field by the Town. The only housing

plans the Town ever had respecting Mitchel Field were either aborted or are awaiting fruition.

The Town offered to purchase 191 acres at Mitchel Field [Transcript 505]. This proposal was rejected [Tr 513] and the parcel was, instead, acquired by Nassau County [Tr 514].

The Town of Hempstead Housing Authority, an independent corporation created by legislative fiat of the Town Board [Tr 795] plans to construct 250 senior citizen housing units on the Santini site at Mitchel Field and 75 family units throughout the Town [Tr 806] in complete accord with HUD [Tr 1233] notwithstanding earlier differences [Tr 922].

It is understandable, then, that plaintiffs, in their Statement of the Case [Pl Br p. 1] are silent respecting the Town when they declare the issue to be "the determination by appellee Nassau County to reverse long standing plans to include low-income housing for families" at Mitchel Field; and "The complaint . . . alleged inter alia that Nassau County's action in reversing plans to build low-income family housing at Mitchel Field" [Pl Br p. 2]; and, further, "Upon his subsequent election to office, County Executive Caso reversed all prior plans . . . " [Pl Br p. 5].

Moreover, in stating the issues in the case [Pl Br p. 2] and the allegations of the complaint [Pl Br p. 3] respecting the Town, plaintiffs point to a refusal to permit low-income family housing at Mitchel Field, the significance of which is hereafter discussed.

It is readily apparent, therefore, that any claim on the part of plaintiffs alleging reversal of housing plans at Mitchel Field, does not, in any way, pertain to the Town.

There having been no question of law or fact on whether the Town reversed family housing plans at Mitchel Field, it follows, using plaintiffs' own argument, that no racial purpose [Pl Br vi - 1] or discriminatory effect thereof [Pl Br vi - 2] attributable to the Town exists. It also follows that the compelling state interest test [vi - 3] or any violation of the Federal Housing Act of 1968 [vi - 4] referable to the Town are not germane.

These questions of law and fact, not having been presented at the trial, and the lower court not having passed thereon, and plaintiffs having raised the question for the first time, albeit perfunctorily, the appeal, insofar as the issues raised by plaintiffs are concerned, must be dismissed (Virtue v. Creamery Package Mfg. Co., 227 US 8, 38, 33 S.Ct. 202, 57 L.Ed. 393; Hoyt v. Clancy, 180 F 2d 152; Rogers v. Union Pacific R. Co., 145 F 2d 119).

ON THE QUESTION OF WHETHER THE TOWN REFUSES TO PERMIT LOW-INCOME FAMILY HOUSING AT MITCHEL FIELD

The record is totally devoid of any evidence tending to show that the Town is embarked on any course whatsoever regarding the development of Mitchel Field save, perhaps, the Town Housing Authority's plans to construct 250 senior citizen units at the Santini site.

The Town Board has made zoning changes at Mitchel Field for various uses the propriety of which has been laid to rest at the trial by plaintiffs' own witnesses. In any event, no issue on that question is made on this appeal. One can only suppose that plaintiffs meant to prove the Town's refusal to permit low-income housing at Mitchel Field by the bare assertion that there is no multiple housing use classification within the bounds of that property.

It is true that the Town Board has not initiated any rezoning procedures providing for multiple-family housing at Mitchel Field. It would be illogical to conclude therefrom that the Town Board is opposed to housing at Mitchel Field or refuses to permit low-income houses thereat. Indeed, the Town Board would be ill-advised to initiate any zoning changes at Mitchel Field until it is reasonably certain of the ultimate uses and specific locations thereof. There are many and varied plans for the

development of Mitchel Field in varying degrees of development [Pl Br p. 115]. Responsible zoning requires a clear awareness of the adjacent and surrounding uses without which awareness there can be no intelligent evaluation of a rezoning proposal. There are many factors to be considered in any rezoning application (see McKinneys Town Law, Section 263 entitled, "Purposes in View").

Zoning involves much more than mere classification. Among other things, it involves the consideration of future growth and development, adequacy of drainage and storm sewers, public streets, pedestrian walkways, density of population and many other factors which are peculiarly within the legislative competence. (City of Miami Beach v. Weiss, 217 So. 2d 836; City of South Miami v. Martin Bros. Inc., 222 So. 2d 775).

In the prayer for relief in plaintiffs' complaint [Pl App Part I p. 51-A], they ask the court to enjoin the Town from exercising its legislative prerogative in holding a hearing for a rezoning application relating to Mitchel Field.

It is respectfully submitted that the judicial role in zoning matters is limited to inquiry and review to determine the reasonableness and constitutionality of an ordinance which, at

the outset, is entitled to the strongest possible presumption of validity (Nectow v. Cambridge, 277 US 183, 72 L.Ed. 842; Village of Euclid, Ohio v. Ambler Realty Co., 272 US 365; 71 L.Ed. 303; Rodgers v. Tarreytown, 302 NY 115, 96 NE 2d 732; Standard Oil Company v. Tallahassee, 183 F 2d 410).

In the final analysis and notwithstanding the court's knowledge or that it may be singularly adroit in making an intelligent, rational zoning determination, it simply cannot substitute its judgment for that of the local legislative body (Nectow v. Cambridge, Village of Euclid, Ohio v. Ambler Realty Co., supra; Village of Tonka Bay, 64 F Supp. 214, Aff'd 156 F 2d 672). This is especially so where, as here, the Town of Hempstead has yet formally to consider any proposal to rezone for multiple-family housing in Mitchel Field. Any attempt by the court to so do now, would be an unwarranted invasion into the field of legislation contrary to the fundamental Doctrine of Separation of Powers. It would "be productive of nothing but mischief . . . " (Perkins v. Lukens Steel Co., 310 US 113).

In City of Miami Beach v. Weiss, supra, the Appellate Court, reversing a lower court decision directing the city to rezone property from single family to multiple-family use, said:

> " . . . ultimate classification of lands under zoning ordinance involves the exercise of legislative power, preventing the courts under the Doctrine of Separation of Powers from the invasion of this field."

In City of South Miami v. Martin Bros., Inc., supra,:

> "However, in choosing a particular liberalized classification and directing the city to so zone the property, the trial court invaded the legislative field, which is prohibited under the Doctrine of Separation of Powers . . . "

In Tandy v. The City of Oakland, 208 Cal. App. 2d 609, 25 Cal Rptr. 429, an action to compel a rezoning of property from multiple dwelling to commercial use:

> "it is a long settled law that the enactment of a zoning ordinance is purely a legislative act and a governmental function. It is to be distinguished from the granting or denial of a variance, a conditional use permit or an exception to a use, all of which call for administrative action, and none of which is involved here . . . Thus the complaint simply asks the Court to issue a writ to compel defendant to perform a legislative act, namely, to pass an ordinance according to plaintiff's plan . . . It is elementary that the Courts have no such power."

In Addis v. Smith, 225 Ga. 157, 166 SE 2d 361, an action for writ of mandamus to compel the Mayor and the members of City Council to rezone a certain tract of land and where lower court entered judgment granting mandamus absolute, the Supreme Court of Georgia, reversing, stated:

> "In rendering such a judgment the Judge of the Superior Court exceeded his power and authority. It is fundamental that the power to zone or rezone property is conferred by the Constitution upon the governing authorities of the various municipalities, and that in matters of zoning the exercise of judgment and discretion on the part of the body upon whom the power is conferred is involved. No court can substitute its judgment for the judgment of the Mayor and Council in such matters."

The relief sought in the above case was a rezoning of commercial land to multiple-family residential use so as to authorize the erection thereon of apartment houses. The Appellate Court noted that there was no claim made in the complaint that the ordinance as it existed was unconstitutional. The Court was, therefore, unable to review what effect, if any, the ordinance had on the constitutional rights of plaintiffs.

In Besselman v. City of Moses Lake, 208 P 2d 689, an action to compel rezoning of certain lands from residential to industrial use where lower court granted the petition, the Appellate Court, notwithstanding the "ethical overtones of the city's procedure", stated:

> "The city council cannot be compelled to pass a rezoning ordinance, however fair, reasonable, and desirable it may be, as that represents an exercise of legislative discretion. (State ex rel Ogden v. City of Bellevue, 275 P 2d 899). The familiar principle of the division of powers is decisive of this case, and we cannot direct the city council of Moses Lake how to exercise its legislative discretion."

A court does not function as a super-zoning commission (Tireman-Joy-Chicago Improvement Ass'n. v. Chernick, 361 Mich. 211, 105 NW 2d 57) nor should it pass upon matters which should initially be determined by a legislative body (Treadway v. Rockford, 24 I11. 2d 488, 182 NE 2d 219; Palangio v. Chicago, 23 I11 2d 570, 179 NE 2d 663). It should not act as a municipal zoning board (Adams v. Reed, 239 Misc. 437, 123 So. 2d 606). It may declare what a zoning classification may not be but does not extend to a fixation of what it deems to be a proper zoning classification (Shapiro v. Town of Oyster Bay, 27 Misc. 2d 844, 211 N.Y.S. 2d 414). A court cannot write nor rewrite the zoning laws, nor may it lay down rules for a zoning board (East Chicago, Ind. v. Sinclair Refining Co., 232 Ind. 295, 111 NE 2d 459; Wilkins v. San Bernardino, 29 Cal. 2d 332, 175 P 2d 542). Where the court decides that a provision of the zoning ordinance covering minimum size lots is unreasonably large and, therefore, void, it still does not have the right to assume the role of a legislator and impose upon the subject parcel a smaller lot size (Roll v. Troy, 370 Mich. 94, 120 NW 2d 804). A court cannot enjoin legislative action to amend zoning ordinance (Randall v. Township Board of Meridian, 342 Mich. 605, 70 NW 2d 728). Finally, a statute perporting to authorize appeals from legislative body to a court regarding petitions to zone or rezone property violated the constitutional provision for separation of powers (Ball v.

Jones, 272 Ala. 305, 132 So. 2d 120).

CONCLUSIONS

The Building Zone Ordinance of the Town of Hempstead, applicable to the lands and premises known as Mitchel Field, County of Nassau, New York, is constitutional and valid.

Plaintiffs do not claim, nor was there any proof offered tending to whow, that the zoning ordinance of the Town of Hempstead acts to discriminate against the certified classes or exclude them from its borders. Accordingly, the Building Zone Ordinance of the Town of Hempstead is constitutional and valid.

The absence of a multiple-family housing zone at Mitchel Field is not sufficient to raise even an inference of any violation of a constitutional right or guaranty. Certainly plaintiffs have failed to sustain the required burden of proof if, indeed, any such claim was raised.

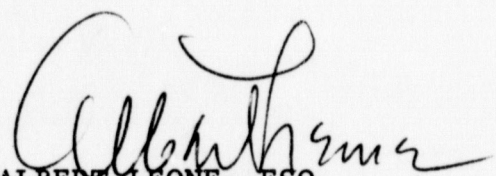
Zoning involves much more than mere allegations of vacant land and a housing need. The propriety of zoning and rezoning is peculiarly within the competence of the local zoning authority whose discretion is not lightly to be interfered with by the courts.

Zoning is a legislative function to be exercised at the discretion of the local zoning authority. While such enactments are judicially reviewable to determine constitutionality and validity, courts do not possess the power to determine ultimate classification. This court is unaware and it has not been sufficiently apprised of the factual considerations prerequisite to making an intelligent, rational determination of what zoning classification best fits Mitchel Field. In any event, under the Doctrine of Separation of Powers, this court is powerless to usurp the legislative prerogative of the Town Board of the Town of Hempstead.

For all of the above and foregoing reasons, it is respectfully submitted that the appeal as against the Town must be dismissed in all respects.

Respectfully submitted,

JOHN F. O'SHAUGHNESSY, ESQ.
Attorney for the Town of
Hempstead and Town of
Hempstead Defendants.



ALBERT LEONE, ESQ.
Of Counsel

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CERTIFICATE OF SERVICE

UNITED STATES COURT OF APPEALS
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NASSAU COUNTY, et al.,

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- X

This is to certify that two copies of Appellee, Town of Hempstead's brief were served on Counsel for Appellants and for Co-Appellees on March 6, 1974 as follows:

Service on Joseph Jaspan, Esq., Counsel for Appellee, Nassau County by hand at his office;

Service on Cyril Human, Esq., Counsel for Appellee, General Service Administration, pursuant to agreement with Counsel by leaving said copies with the Clerk of the Court to be picked up by messenger;

Service on Richard Bellman, Esq., Counsel for Appellants, by hand at the Clerk's Office.

Dated: March 6, 1974

Michael F. Murphy

Michael F. Murphy